UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---x

CARLENE PINTO,

Plaintiff,

-v-

Index No. 15-CV-09696 (CM)

THE CITY OF NEW YORK, et al.,

Defendants.

---x

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendants' motion for summary judgment must fail as it is based on disputed facts and cannot establish plaintiff's arrest was in any way reasonable. Carlene Pinto was participating in a peaceful demonstration by marching on the public sidewalks of New York City. It is undisputed that immediately prior to her arrest, Ms. Pinto only briefly stepped off the sidewalk at the intersection of 56th Street and 12th Avenue before returning to the sidewalk when instructed by officers of the New York City Police Department ("NYPD"). At the time, there was no vehicular traffic and police had blocked the street. Ms. Pinto then stood on the sidewalk quietly holding her sign. Defendant Sergeant ("Sgt.") Joseph Diaz nonetheless aggressively approached Ms. Pinto and violently dragged her from the sidewalk into the street, causing her arrest. The events leading up to and including plaintiff's arrest are captured on video from multiple angles. See Declaration of Gillian Cassell-Stiga (hereinafter "Cassell Decl."), Exhibit A ("Video"). In light of defendants' inability to establish probable cause on the undisputed facts shown on video, defendants have subsequently manufactured an entirely disputed narrative concerning multiple previous violations not captured in the video and only supported by Sgt. Diaz's own testimony. These ***wholly disputed*** previous violations cannot support summary judgment. See Marcavage v. City of New York, 689 F.3d 98, 110 (2d Cir. 2012).

STATEMENT OF FACTS

Carlene Pinto was unlawfully arrested by New York City Police Department ("NYPD") Sergeant Joseph Diaz. Ms. Pinto is a 28-year-old female who was employed by the Riverside Church of New York as the coordinator of mission and social justice programming at the time of her arrest. See Exhibit K ("Pinto Dep.") at 8:7-8, 12:3-21. On April 29, 2015, Ms. Pinto went to work where she communicated with and coordinated congregants in preparation for a Black

Lives Matter rally scheduled for 6:00 p.m. in Union Square. Id. at 12:25-13:11, 18:2-12. Ms. Pinto traveled with her congregants to Union Square by subway. Id. at 18:3-8. Ms. Pinto was dressed in a black sweatshirt with the words "Justice League NYC" printed in white letters on the front. See Exhibit A, Video A2 ("Video A2"), at 01:10. She also carried a sign that stated "FIRE DANIEL PANTALEO." Id. at 00:17. Daniel Pantaleo is the NYPD officer seen on video using a chokehold to restrain Eric Garner prior to his death on July 17, 2014. See Plaintiff's Local Rule 56.1 Response in Opposition to Motion for Summary Judgment ("Rule 56.1 Opp."), at ¶ 55.

After the rally, Ms. Pinto continued to march peacefully with a group of demonstrators for approximately two hours. See Pinto Dep. at 18:8-19:2, 20:13-21. Ms. Pinto kept to the sidewalk, but stepped into the street at moments when she was displaced by the volume of people on the sidewalk. Id. at 26:20-27:4. Ms. Pinto also entered the street to cross at intersections. Id. at 28:1-5). During the march, police officers blocked traffic to allow protestors to cross streets and proceed through the city safely. See Exhibit L1 ("Diaz Dep. L1") at 12:14-17; Exhibit M ("Richardson Dep.") at 28:7-11. When Ms. Pinto heard announcements directing demonstrators to get onto the sidewalk, Ms. Pinto "continued" to comply. See Pinto Dep. at 21:14-17. Officers were not present on every block Ms. Pinto traversed through the city. Id. at 21:16-17.

When Ms. Pinto arrived at 12th Avenue, she began walking north on the sidewalk east of the avenue. See Exhibit Q ("Ferrara Decl.") at ¶3; Exhibit R ("Newsome Decl.") at ¶2-3. At 56th Street, the north-bound lanes on 12th Avenue were closed to vehicular traffic. See Pinto Dep. at 27:1-8. NYPD motorbikes were lined up side-by-side blocking traffic. Id. at 24:15-26:10. There were no vehicles apart from NYPD vehicles and scooters accompanying demonstrators. See Exhibit M ("Liang Dep.") at 49:6-17; Pinto Dep. at 24:15-26:10; Richardson Dep. at 72:3-25.

Ms. Pinto briefly stepped west into 12th Avenue just north of the corner at 56th Street. See Exhibit P ("Pinto Decl.") at ¶5; Exhibit U. When standing a few steps from the curb, Ms. Pinto heard verbal instructions to return to the sidewalk. See Pinto Dep. at 28:15-23. As shown on video, Sgt. William Liang was standing directly in front of Ms. Pinto and directed her to get onto the sidewalk. See Exhibit A, Video A1 ("Video A1"), at 00:04-00:11 ("Get back on the sidewalk"); Liang Dep. at 80:22-81:11. Ms. Pinto immediately retreated backwards onto the sidewalk with hands raised in compliance. See Video A1; Pinto Dep. at 28:15-23. It is undisputed, Ms. Pinto did not argue or protest the instruction, and complied within seconds of the officer's request. See Pinto Dep. at 28:15-29:5; Exhibit L2 ("Diaz Dep. L2") at 85:9-86:14, 116:11-12; Richardson Dep. at 77:3-6; Ferrara Decl. at ¶5-6; Newsome Decl. at ¶5-6.

All of the demonstrators present at 12th Avenue and 56th street complied with the verbal instructions to get on the sidewalk. See Video; Liang Dep. at 50:3-51:8. The instruction to get back on the sidewalk was issued at multiple protesters, but there were no orders to leave or disperse. See Pinto Dep. at 28:15-23; Liang Dep. at 64:4-65:6; Richardson Dep. at 71:21-72:2; Ferrara Decl. at ¶3; Newsome Decl. at ¶2-3. After complying with the request, Ms. Pinto stood silently on the sidewalk. See Video A1. Ms. Pinto was not yelling, speaking, or engaged in any threatening or violent behavior. See Video A1; Pinto Dep. at 29:20-30:7; Diaz Dep. L2 at 114:8-19. A number of NYPD officers lined up in front of the demonstrators located on the sidewalk. See Video; Liang Dep. at 34:22-35:2. Protesters gathered behind Ms. Pinto either remained standing nearby or proceeded walking north towards 57th Street. See Video.

Seconds after Ms. Pinto had returned to the sidewalk, Sgt. Joseph Diaz (Shield No. 4744), identifiable by the shield number printed on his helmet, approached Ms. Pinto from the north and stopped between her and the line of officers directly in front of her. See Video A1. Sgt. Diaz did not verbally communicate with Ms. Pinto. See Video A1; Diaz Dep. L2 117:3-23. Instead, Sgt. Diaz reached out and grabbed Ms. Pinto's right arm – which was holding her sign – and pulled violently. See Video A1; Pinto Dep. at 29:1-5. Ms. Pinto was propelled forward and into the street, as were protesters linked to Ms. Pinto by arm. See Video A1. Individuals attempted to pull Ms. Pinto back onto the sidewalk and Ms. Pinto was effectively caught in a tug of war. See Pinto Dep. at 29:20-30:7. Ms. Pinto began shouting, "I am not resisting." See Video. Sgt. Diaz threw Ms. Pinto to the ground in the street where she was surrounded by a crowd of at least seven officers and placed under arrest. Id.

Ms. Pinto was held overnight and released at approximately 6 a.m. the following morning with a Desk Appearance Ticket. See Exhibit B. The desk appearance ticket was issued for the disorderly conduct – obstructing traffic, pursuant to New York Penal Law ("N.Y.P.L.") §240.20(5), but included no supporting facts. Id. The criminal court complaint filed by Sgt. Diaz against Ms. Pinto alleged Ms. Pinto violated two subsections of the disorderly conduct statute, N.Y.P.L. §240.20(5) (obstructing traffic) and N.Y.P.L. §240.20(6) (failure to disperse). See Exhibit C. Ms. Pinto appeared in Court on two occasions. See Rule 56.1 Opp. at ¶ 45. The charges against Ms. Pinto were dismissed by motion of the District Attorney's office and sealed on December 16, 2015. See Exhibit D.

Ms. Pinto found the unprovoked assault and arrest terrifying and sought counseling from clergy at the New York Theological Seminary. See Pinto Dep. at 35:22-36:11. Ms. Pinto also missed a day of work as a result of the arrest, which became a subject of contention with her employer at Riverside Church. Id. at 32:21-33:16. On July 28, 2015, Plaintiff served a notice of claim on the City of New York (the "City") within 90 days of the arrest. See Exhibit E. The Comptroller incorrectly addressed the notice of a 50-h hearing sent to Ms. Pinto and, as a result, it was only received by Ms. Pinto the day prior to the date noticed therein. See Cassell Decl. at ¶9. Plaintiff's counsel contacted the Comptroller regarding the error and to reschedule the hearing, but no response was ever received. See Cassell Decl. at ¶9-13.

Sgt. Diaz is a supervising officer in the Strategic Response Group, the "large scale Demonstration and Protest Unit." See Diaz Dep. L1 at 42:20-45. Sgt. Diaz is the only officer of many present at the time of Ms. Pinto's arrest who claims to have witnessed Ms. Pinto committing a violation prior to her being grabbed. See Exhibit O (Declarations of Officers Michael Ho and James O'Brien); Liang Dep. at 69:6-20, 78:15-7; Richardson Dep. at 58:25-59:4, 60:25-61:2. And yet, Sgt. Diaz had directly contradicted himself in sworn testimony multiple times. At first, Sgt. Diaz first testified repeatedly that the only instructions given to the protesters were to keep to the sidewalk. See Diaz Dep. L2 at 63:20-65:9; 65:4-65:9, 77:10:21. He also stated these were the only commands issued at Ms. Pinto:

> Q And how were they interacting with Ms. Pinto?
> A Instructing the protestors to get back on the sidewalk.
> Q Did you hear them instruct the protestors to do anything else at that time?
> A No.
> Q What did Ms. Pinto do in response?
> A She was back on the sidewalk.
> (Diaz Dep. L2 at 85:9-17)

Sgt. Diaz then contradicted his earlier testimony to claim Ms. Pinto violated an order to leave:

> A. What I stated earlier was that she was, part of the context of what was said over the bull horn and by several officers there, were to get back on the sidewalk. So part of the message that was conveyed over the bull horn, I believe was to leave the area. It's on the video.
> Q. Did you hear anyone inform Ms. Pinto to leave the area?
> MR. BECK: Objection as to form.

A. Yes.
Q. You heard officers instruct Ms. Pinto to leave the area?
MR. BECK: Objection as to form.
A. I observed a lieutenant or captain inform Ms. Pinto to leave the area.
Q. And where was it that this instruction to leave the area occurred?
A. At 56th Street and 12th Avenue.
(Diaz Dep. L2 at 102:8-25)

Sgt. Diaz then claims to have seen a white shirt high ranking officer standing only five feet north of Ms. Pinto in the roadway, instructing individuals to leave the area - not simply to get back on the sidewalk. See Diaz Dep. L2 at 101:11-108:4. This portion of his testimony directly contradicts the video in which no such officer is seen in that area of the roadbed. See Video. Sgt. Diaz is also inconsistent as to whether he presented his memobook entry for the incident to someone at the District Attorney's office. See Diaz Dep. L1 at 59:17-8 ("I did not show my memo book entries to anyone"), compare Id. at 66:8-16 ("Q. And what did you do with those copies of your memo book? A. Hand them over to the District Attorney."). Sgt. Diaz's testimony also directly contradicts the video evidence on other material facts:

Q. Was Ms. Pinto yelling while standing in the roadway?
A. Yes.
Q. And you said that she was in the roadway for several seconds, was she yelling that entire time?
A. Yes.
(Diaz Dep. L2 at 75:11-17)

Q. When Ms. Pinto stepped off the sidewalk at 56th Street the second time she was facing west and was linking arms with two individuals and chanting; is that correct?
A. Correct.
(Diaz Dep. L2 at 84:10-19)

A jury would be permitted to entirely discredit Sgt. Diaz's inconsistent testimony. The City was put on notice of Sgt. Diaz's misconduct prior to the arrest of Ms. Pinto by virtue of four prior federal law suits in which St. Diaz was a named defendant, and corresponding video of his conduct. See Cassell Decl. at ¶25. Sgt. Diaz was not disciplined or trained in response to the conduct these complaints. See Diaz Dep. L2 at 7:12-19.

STANDARD OF REVIEW ON SUMMARY JUDGMENT

Summary judgment is proper only "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" within the meaning of Rule 56 when its resolution "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. A Court should consider only the undisputed evidence and must grant plaintiff every possible favorable inference. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge" ruling on a motion for summary judgment. Id. at 255. "[T]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Tolan v. Cotton, 134 S. Ct. 1861, 1863 (2014) (quoting Anderson v. Liberty Lobby, 477 U.S. at 255) (internal quotation marks omitted). "[A]lthough the court should review the record as a whole, *it must disregard all evidence favorable to the moving party that the jury is not required to believe*." Zellner v. Summerlin, 494 F.3d 344, 370 (2d Cir. 2007) (emphasis in the original) (quoting Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150-51 (2000)).

The moving party carries the burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, "the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quotation omitted). "If there is any evidence in the record from any source from which a reasonable inference in [the nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment." Binder & Binder PC v. Barnhart, 481 F.3d 141, 148 (2d Cir. 2007) (internal quotations omitted).

ARGUMENT

Point I: Genuine disputes of material fact preclude summary judgment on plaintiff's claims for false arrest and false imprisonment.

Video evidence of the events leading up to and including Ms. Pinto's arrest establish the absence of probable cause for Ms. Pinto's arrest. It is undisputed that Ms. Pinto was arrested after she had fully complied with the instruction to return to the sidewalk. See Video; Pinto Dep. at 28:15-29:5; Diaz Dep. L2 at 85:9-86:14, 116:11-12; Richardson Dep. at 77:3-6; Ferrara Decl. at ¶5-6; Newsome Decl. at ¶5-6. Defendants argue probable cause existed for Ms. Pinto's arrest pursuant to N.Y.P.L. § 240.20(5) (blocking vehicular and pedestrian traffic) and N.Y.P.L. § 240.20(6) (failure to obey a lawful order to disperse), although in addition to Ms. Pinto's own testimony and Video evidence, officer testimony supports: (1) no order to "disperse" was ever issued (Liang Dep. at 64:4-65:6; Richardson Dep. at 71:21-72:2), (2) Ms. Pinto complied with police commands to return to the sidewalk (Video), (3) vehicular traffic was not present (Liang Dep. at 49:6-17; Richardson Dep. at 72:3-25), (4) Ms. Pinto did not block traffic (Richardson Dep. at 72:21-73:5, 76:16-19, 87:6-12), and (5) Ms. Pinto protested peacefully (Diaz Dep. L2 at 114:8-19). Defendants also argue probable cause existed pursuant to V.T.L. § 1156(a), although this section is not applicable in New York City and therefore cannot provide probable cause for an arrest.

In response to the insurmountable evidence establishing liability, defendants now attempt to claim probable cause was establish earlier in the day based only on defendant Sgt. Diaz's disputed testimony. On a motion for summary judgment, however, the facts must be viewed in the light most favorable to plaintiff, with every permissible inference in her favor. Sgt. Diaz's testimony is uncorroborated by officers present at the time of plaintiff's arrest and directly contradicts testimony of plaintiff and witnesses. Further, a jury could entirely discredit Sgt. Diaz's testimony due to his verifiable misrepresentation of the facts as documented on video of the incident and his repeated self-contradiction in sworn testimony, as discussed supra. In short, a jury could conclude that Sgt. Diaz provided false testimony about material facts, and cannot be believed. Sgt. Diaz's testimony cannot support dismissal of Ms. Pinto's claims.

Plaintiff's false arrest claim must survive defendants' motion for summary judgment. To state a claim for false arrest, a plaintiff must show: (1) the plaintiff was conscious of the confinement, (2) the plaintiff did not consent to the confinement, (3) the defendant intended to confine the plaintiff, and (4) the confinement was not otherwise privileged. Savino v. City of New York, 331 F. 3d 63, 75 (2d Cir. 2003). Defendants do not contest the first three elements of the false arrest claim, and only the issue of privilege is in dispute. It is undisputed Sgt. Diaz intended to arrest Ms. Pinto. Diaz Dep. L2 at 88:12-21, 91:16-24 ("Ms. Pinto was under arrest for disobeying a lawful order to stay on the sidewalk and whatever else she was charged with"). Also, Ms. Pinto was aware of her confinement and did not consent. See Pinto Decl. at ¶ 9.

Defendants allege Ms. Pinto's arrest was supported by probable cause and therefore privileged. The existence of probable cause is a complete defense to a claim for false arrest. See Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996). Probable cause exists only "when the officers have knowledge of, or reasonably trustworthy information as to, facts and circumstances that are sufficient to warrant *a person of reasonable caution* in the belief that an offense has been or is being committed by the person to be arrested." Manganiello v. City of New York, 612 F.3d 149, 161 (2d Cir. 2010) (emphasis added). The probable cause inquiry is objective in nature - it does not consider the officer's subjective beliefs about whether certain facts amount to probable cause. See Devenpeck v. Alford, 543 U.S. 146, 154 (2004) (citing Whren v. United States, 517 U.S. 806, 813 (1996)). Courts look to the "totality of the circumstances" in deciding whether probable cause exists for an arrest. Illinois v. Gates, 462 U.S. 213, 238 (1983). The existence of probable cause may be determined as a matter of law only if there is no dispute as to the pertinent events and the knowledge of the officers. See Rheingold v. Harrison Town Police Dep't, 568 F. Supp. 2d 384, 390 (S.D.N.Y. 2008) (citing Weyant, 101 F.3d at 852). Ultimately, defendants have failed to meet their burden in showing any undisputed fact that would entitled them to summary judgment in light of the video showing plaintiff complying with the request to move to the sidewalk. Defendants' motion for summary judgment on plaintiff's claims for false arrest and false imprisonment must be denied.

A. Ms. Pinto did not commit disorderly conduct pursuant to N.Y.P.L. §240.20.

Defendants lacked probable cause to arrest Ms. Pinto for disorderly conduct pursuant to N.Y.P.L. §240.20. The gravamen of disorderly conduct is conduct that provokes, or risks provoking, a "breach of the peace" (People v. Munafo, 50 N.Y.2d 326, 331 (1980)) or "public disturbance" (People v. Bakolas, 59 N.Y.2d 51, 54 (1983)). See also Provost v. City of Newburgh, 262 F.3d 146, 157 (2d Cir. 2001). In order to establish a violation of the disorderly conduct statute, one must establish three elements: (i) the defendant's conduct must be "public" in nature, (ii) it must be done with "intent to cause public inconvenience, annoyance or alarm" or with recklessness as to "a risk thereof," and (iii) it must match at least one of the descriptions set forth in the statute. Id.

The Supreme Court has made clear police may not interfere with public assemblies and demonstrations unless there is a "clear and present danger" of riot, imminent violence, interference with traffic or other immediate threat to public safety. See Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) ("When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."). Even demonstrations that slow traffic or inconvenience pedestrians do not justify police stopping or interrupting a public protest. See Papineau v. Parmley, 465 F.3d 46, 58 (2d Cir. 2006) (citing to Cox v. Louisiana, 379 U.S. 536, 546-47 (1965)). Here it is undisputed that Ms. Pinto, along with other protesters, returned to the sidewalk in full compliance with police orders after entering the street for merely seconds. See Pinto Dep. 28:15-29:5; Liang Dep. 50:3-51:8; Diaz Dep. L2 at 85:9-86:14, 116:11-12; Ferrara Decl. at ¶5-6; Newsome Decl. at ¶5-6. Defendants cannot show that there was a "clear and present danger" of riot, imminent violence, interference with traffic or other immediate threat to public safety on the desolate block of 12th Avenue. If anything, it was Sgt. Diaz's arbitrary and aggressive arrest of Ms. Pinto that provoked a reaction from otherwise peaceful protesters nearby.

i. Defendants cannot establish the intent to cause public inconvenience, annoyance or alarm in light of video evidence.

Defendants cannot establish Ms. Pinto intended to cause public inconvenience, annoyance or alarm or acted with recklessness as to a risk thereof. Video evidence establishes that Ms. Pinto quietly returned to the sidewalk as directed, and continued to comply with officer requests to stay on the sidewalk prior to her arrest. See Video A1. Although on summary judgment the evidence must be viewed in the light most favorable to plaintiff as the non-moving party, when there is reliable objective evidence - such as a recording - the evidence may speak for itself. See Marcavage, 689 F.3d at 110 (citing Scott v. Harris, 550 U.S. 372, 378-81 (2007)). Ms. Pinto's compliance does not suggest the "culpable mental state to create a public disturbance." People v. Barrett, 821 N.Y.S.2d 416, 429 (N.Y. City Crim. Ct. 2006). Ms. Pinto did not argue with officers or protest their instruction. See Pinto Dep. 28:15-29:5; Diaz Dep. at 85:9-86:14, 116:11-12; Richardson Dep. at 77:3-6. Ms. Pinto quietly returned to the sidewalk with her hands raised in compliance. See Video A1. Ms. Pinto then remained silently standing on the sidewalk, holding her sign, until her arrest. Id. A jury could determine the video evidence establishes Ms. Pinto's intent was to comply, not to cause public inconvenience, annoyance or alarm, and that she did not act recklessly. Defendants cannot establish Ms. Pinto committed disorderly conduct as "to demonstrate the existence of probable cause for disorderly conduct as a matter of law, [defendant] was required to show that no reasonable jury could have failed to find such a reasonable belief [of intent]." McClellan v. City of Rensselaer, 395 Fed. Appx. 717, 718 (2d Cir. 2010).

Defendant's further argue in conclusory fashion that Ms. Pinto violated both N.Y.P.L. §240.20(5) and N.Y.P.L. §240.20(6), without identifying any supporting facts or conduct that would meet the elements of either violation. In fact, defendants fail to apply the facts to the law whatsoever. The facts as viewed in the light most favorable to plaintiff simply do not establish a violation of any subsection of N.Y.P.L. §240.20.

ii. Defendants lacked probable cause pursuant to N.Y.P.L. §240.20(6) where there was no order to disperse.

Ms. Pinto did not fail to comply with a lawful order to disperse pursuant to N.Y.P.L. §240.20(6) where she was only instructed to get back on the sidewalk and she immediately compiled. The statute states "[a] person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof… [sh]e congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse." Here, in addition to the absence of intent to cause a disturbance, defendants cannot establish either an order to disperse or a failure to comply where Ms. Pinto immediately returned to the sidewalk as instructed by officers.

At the time of Ms. Pinto's arrest no order to disperse was issued. An order to 'get back' or 'step away' is legally distinct from an order to 'disperse.' "That word, as used in the statute, means '[t]o separate, go different ways.'" Higginbotham v. City of New York, 105 F. Supp. 3d 369, 373 (S.D.N.Y. 2015) (citing Oxford English Dictionary (2d ed. online version Mar. 2015). Upon arriving at 12th Avenue and 56th Street and briefly stepping into the street a few feet from the curb, Ms. Pinto was instructed by an officer to "get back on the sidewalk. See Video; Pinto Dep. at 28:15-23. Importantly, Officer Richardson and Officer Liang also testified that the only instructions issued at the intersection of 12 Avenue and 56th Street were simply to get onto the sidewalk. See Liang Dep. at 63:24-65:6; Richardson Dep. 70:14-72:2). According to Ms. Pinto, officers, and witnesses, no other instructions were communicated at the time. Pinto Dep. at 28:15-23; Liang Dep. 64:4-65:6; Richardson Dep. at 71:21-72:2; Ferrara Decl. at ¶3; Newsome Decl. at ¶2-3. Officer Diaz's contrary testimony cannot support summary judgment or a finding of qualified immunity.

Further, as a matter of law, an order to disperse pursuant to N.Y.P.L. §240.20(6) must be directed at a group – not a lone individual. See Higginbotham, 105 F. Supp. at 374, see also Holmes v. City of New York, No. 14 Civ. 5253 (LTS), 2016 U.S. Dist. LEXIS 27945 *10 (S.D.N.Y. Mar. 4, 2016). Defendants concede only two individuals were arrested at that time and location, despite the great volume of demonstrators remaining after Ms. Pinto's arrest and the presence of ample police personnel. See Rule 56.1 Opp. at ¶ 36. It is clear no order to disperse was ever issued, nor was an alleged failure to comply enforced by anyone other than Sgt. Diaz. As a matter of law, defendants cannot establish probable cause where there was no lawful order to disperse. Papineau, 465 F.3d at 60 (denying qualified immunity where no evidence a dispersal order was issued).

iii. Defendants lacked probable cause pursuant to N.Y.P.L. §240.20(6) where Ms. Pinto fully complied with instructions.

Ms. Pinto *did in fact* comply with officers' requests. It is well-settled that in addition to a establishing a lawful order to disperse, defendants must show plaintiff was afforded the opportunity to comply and refused. See Mesa v. City of New, 09 Civ. 10464 (JPO), 2013 U.S. Dist. LEXIS 1097 *40 (S.D.N.Y. Jan. 3, 2013) (citing Dinler v. City of New York, 04 Civ. 7921 (RJS) (JCF), 2012 U.S. Dist. LEXIS 141851 (S.D.N.Y. Sept. 30, 2012)). When instructed to return to the sidewalk, Ms. Pinto immediately backed up and returned to the sidewalk with arms raised further communicating the intent to comply. See Video; Pinto Dep. at 28:15-23. While Ms. Pinto backed up slowly to due to the presence of other individuals immediately behind her, this did not constitute a failure to comply. See Mesa, 2013 U.S. Dist. LEXIS 1097 *41. It is also undisputed Ms. Pinto never verbally refused to comply with the officers' instruction. (Richardson Dep. at 77:3-6, Diaz Dep. at 116:11-12). In fact, Sgt. Diaz also admits Ms. Pinto was in the roadbed at 56th Street for merely seconds. See Diaz Dep. L2 at 84:17-19. Defendants cannot establish a failure to disperse where the undisputed facts actually establish that no order to disperse was ever issued and that Ms. Pinto complied with the officers' instructions.

Floundering to establish probable cause, the defendants' witnesses attempt to argue that the earlier violations by other demonstrators were evidence of Ms. Pinto's own noncompliance.

However, "one who has violated no law may [not] be arrested for the offenses of those who have been violent or obstructive." Jones v. McMahon, 98 Civ. 374 (FJS) (GHL), 2005 U.S. Dist. LEXIS 42291, *33 (N.D.N.Y Mar. 28, 2005) (citing Wash. Mobilization Comm. v. Cullinane, 566 F.2d 107, 120 (D.C. Cir. 1977)) (discussing the requirement of fair notice and an opportunity to comply with a lawful order to disperse). Nor can Sgt. Diaz's testimony as to repeated violations support summary judgment where a jury is entitled to discredit his testimony entirely.

iv. Defendants lacked probable cause pursuant to N.Y.P.L. §240.20(5) where Ms. Pinto was not blocking traffic.

Ms. Pinto was not obstructing vehicular or pedestrian traffic in violation of N.Y.P.L. §240.20(5). "New York courts have interpreted [N.Y. Penal Law § 240.20(5)] to permit punishment only where the conduct at issue does more than merely inconvenience pedestrian or vehicular traffic." Papineau, 465 F.3d at 59 (citing People v. Pearl, 321 N.Y.S.2d 986, 987 (1st Dep't 1971) ("Something more than the temporary inconvenience cause to pedestrians by the demonstrators' blocking of the west crosswalk, requiring them to enter the roadway to get to the other side, was required to sustain a conviction for obstructing pedestrian traffic.")).

Ms. Pinto did not obstruct vehicular traffic. When Ms. Pinto arrived at the corner of the intersection east of 12th Avenue and north of 56th Street, vehicular traffic was not moving in the northbound lanes. See Pinto Dep. 24:15-26:10. Video evidence shows an absence of northbound vehicular traffic on 12th Avenue and only a line of scooters and police vehicles arranged in front of the protesters. See Video. Neither Sgt. Liang or Officer Richardson remembered there being vehicular traffic on 12th Avenue, apart from the NYPD vehicles directing the demonstrators. See Liang Dep. 48:2-50:2; Richardson Dep. 72:3-73:5, 74:13-18. Officer Richardson also did not see Ms. Pinto block any vehicles. See Richardson Dep. 76:13-19. Officer Richardson did not see Ms.

Pinto obstruct pedestrian traffic. Id. 76:13-15. Sgt. Diaz testified that Ms. Pinto *only stepped a foot from the curb*. See Diaz Dep. L2 83:24-84:1. Nonetheless, Sgt. Diaz believed this to be sufficient to establish the violation. Id. 83:24-84:1, 96:6-15. Even if defendants were able to establish Ms. Pinto temporarily inconvenienced traffic by entering the roadbed not far from the curb, Ms. Pinto did not commit N.Y.P.L. §240.20(5) where defendants cannot establish Ms. Pinto blocked a single vehicle in those few seconds.

In fact, given the line of scooters between Ms. Pinto and the lanes of traffic, Ms. Pinto could not have blocked any vehicles. See Video. It is also undisputed that Ms. Pinto briefly entered the street for merely seconds and then stood on the sidewalk at the edge of the curb (also allowing other protesters to continue walking). See People v. Nixon, 248 N.Y. 182, 185 (1995) (overturning disorderly conduct conviction where protestors who occupied the entire sidewalk forced pedestrians out into the street). Even were defendants to establish that traffic was in fact blocked by some number of the protestors, there is no evidence that plaintiff, did the blocking or even intended to do the blocking. See Zellner, 494 F.3d at 372. “New York courts have interpreted this statute to permit punishment only where the conduct at issue does more than merely inconvenience pedestrian or vehicular traffic.” Papineau, 465 F.3d at 59. Ms. Pinto simply did not obstruct vehicular or pedestrian traffic.

v. Defendants lacked probable cause pursuant to any other subsection of N.Y.P.L. §240.20

Defendants lacked probable cause to arrest Ms. Pinto for any other subsection of the disorderly conduct statute. Officer Diaz first testified that he arrested Ms. Pinto only for obstructing vehicular traffic and for failing to obey a lawful order, and unfortunately his factual narrative does not support a violation pursuant to any subsection of the disorderly conduct statute. Ms. Pinto’s conduct did not constitute a violation of N.Y.P.L. §240.20(2) (unreasonable noise) or N.Y.P.L. §240.20(3) (uses abusive or obscene language, or makes an obscene gesture) where she was quietly and peacefully demonstrating. See Video. In the context of N.Y.P.L. §240.20(2), the term "unreasonable noise" means "a noise of a type or volume that a reasonable person, under the circumstances, would not tolerate." Provost, 262 F.3d at 159 (quoting People v. Bakolas, 59 N.Y.2d at 53). There are similarly no factual allegations that Ms. Pinto was obscene. See Swartz v. Insogna, 704 F.3d 105, 111 (2d Cir. 2013); compare Brown v. City of New York, 798 F.3d 94, 97 (2d Cir. 2015). Ms. Pinto simply was not causing public inconvenience, annoyance, or alarm. See People v. Smith, 19 N.Y.2d 212, 215-216 (1967).

B. Defendants lacked probable cause pursuant to V.T.L. § 1156(a) or any other violation.

Defendants cannot establish probable cause for Ms. Pinto's arrest as a result of any other violation or crime. First, Ms. Pinto did not violate V.T.L. § 1156(a). As a matter of law, V.T.L. § 1156(a) does not apply in New York City and thus cannot provide probable cause for an arrest in this jurisdiction. See Gonzalez v. City of New York, 14 Civ. 7721 (LGS), 2016 U.S. Dist. LEXIS 134474, *32 (S.D.N.Y. September 29, 2016), citing Barbosa v. Dean, 390 N.Y.S.2d 79, 80 (1st Dep't 1976). The section states "[w]here sidewalks are provided and they may be used with safety it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway." V.T.L. § 1156(a). Here, Ms. Pinto stepped west briefly into the street perpendicular to the curb, and therefore it cannot be said that she did "walk along" roadway adjacent to the sidewalk. Defendants cannot establish probable cause pursuant to V.T.L. § 1156(a).

Second, defendants cannot establish probable cause for the obstruction of governmental administration pursuant to N.Y.P.L. §195.05 ("OGA"). Defendants now claim probable cause also existed pursuant to N.Y.P.L. §195.05 due to the alleged failure to disperse. For the reasons cited supra, defendants have failed to establish either an order to disperse or a failure to comply.

Under New York Law, a person is guilty of OGA when she "intentionally…prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference…" It is well established that something more than mere words is required, and that one must have acted by either: (1) intimidation, (2) physical force or interference, or (3) any independently unlawful act. People v. Case, 42 N.Y.2d 98, 102 (1977) (internal citations omitted). Here, it is undisputed Ms. Pinto did not intimidate and did not use physical force prior to her arrest. See Video; Pinto Dep. at 29:20-30:7; Diaz Dep. L2 at 114:8-19; Richardson Dep. at 78:25-79:8. For the reasons stated supra, defendants failed to establish an independently unlawful act. Ultimately, defendants cannot establish any physical interference whatsoever. Defendants have failed to show a physical interference with a specific official function where Ms. Pinto had no interaction with Sgt. Diaz prior to being grabbed from where she was peacefully standing on the sidewalk. Ultimately, defendants sweepingly alleged Ms. Pinto's peaceful conduct constituted a violation of a vague myriad of laws which is both legally unsound and absurd. Defendants cannot establish probable cause for Ms. Pinto's arrest on the undisputed facts in the record.

Point II: Genuine disputes of material fact preclude summary judgment on plaintiff's claim for First Amendment retaliation.

Defendants' motion for summary judgment on plaintiff's claim for First Amendment retaliation must also fail, as a jury could easily determine the baseless arrest was motivated by Ms. Pinto's critique of the NYPD. To make a claim for First Amendment retaliation, plaintiff must prove: (1) she has an interest protected by the First Amendment; (2) defendants' actions were motivated or substantially caused by her exercise of that right; and (3) defendants' actions caused her some injury. See Dorsett v. County of Nassau, 732 F.3d 157, 160 (2d Cir. 2013). At the time of her arrest, Ms. Pinto was engaged in political protest and therefore had an interest protected by the First Amendment. Defendants falsely allege this claim was not pled in the complaint however that is belied by the document itself. See Exhibit J at ¶1, 4, 25, 30. There is also sufficient evidence to determine "[d]efendants were substantially motivated by the desire to retaliate against plaintiff for exercising her First Amendment Right to speech." Id. at ¶25.

Circumstantial evidence of retaliatory intent may supply the causal connection between a plaintiffs protected speech and a defendant's adverse action. See Gronowski v. Spencer, 424 F.3d 285, 293 (2d Cir. 2005). As detailed above, Pinto was peacefully protesting with Black Lives Matter when she was arrested by Sgt. Diaz without probable cause. Importantly, while defendants maintain Ms. Pinto was arrested for repeatedly entering the street, defendants also maintain numerous other individuals repeatedly entered into the street and yet were not arrested. See Rule 56.1 Opp. at ¶36, 38. Both individuals arrested at 56th and 12th Avenue, Ms. Pinto and Ms. Ferrera, were located at the front of a large crowd and had been directing other participants. See Video. Ms. Pinto was wearing a sweatshirt that read "Justice League NYC" at the time and was holding a sign that read "FIRE DANIEL PANTALEO." See Rule 56.1 Opp. at ¶54. It is a reasonable inference that the unlawful arrest was primarily motivated by Ms. Pinto's critique of the NYPD and her role as a leader in the demonstration. Further, Sgt. Diaz's motive and intent may also be inferred by the fact that Sgt. Diaz has previously been sued for arresting protesters without probable cause on four prior occasions. See Exhibit S. These prior lawsuits, while not admissible on propensity, are admissible to show lack of mistake, motive, and to establish whether punitive damages are warranted.

Ms. Pinto can also establish the third element of the claim, as she was concretely harmed by the defendant's retaliatory actions. See Mangino v. Inc. Vill. of Patchogue, 808 F.3d 951, 956 (2d Cir. 2015); Dorsett, 732 F.3d at 160; Gill v. Pidlypchak, 389 F.3d 379, 381-84 (2d Cir.

2004). Ms. Pinto was arrested, detained at the precinct, and forced to appear in Court on multiple occasions among other harms. See Rule 56.1 Opp. at ¶ 40, 45. It is clear Ms. Pinto was harmed by Sgt. Diaz's actions, and that her speech has been restricted as a result - although this is not necessary to make out a claim for First Amendment retaliation. Defendants are not entitled to summary judgment on Ms. Pinto's claim for First Amendment retaliation.

Point III: Genuine disputes of material fact preclude summary judgment on plaintiff's claim for evidence fabrication.

In an abundance of caution, plaintiff reiterates that Sgt. Diaz's sworn statement supporting the criminal complaint, his testimony contradicting video evidence, and his undisputed conversations with the district attorney's office, preclude summary judgment on plaintiff's claims for evidence fabrication. The Second Circuit recently confirmed that even where there is probable cause to arrest a defendant, an officer who subsequently fabricates evidence and forwards that evidence to a prosecutor violates the accused's constitutional right to a fair trial. See Garnett v. Undercover Officer C0039, 15 Civ.1489 (Lead), 15 Civ.1500 (XAP), 2016 U.S. App. LEXIS 17696, *31 (2d Cir. September 30, 2016). The elements of a claim for the denial of a right to a fair trial/fabrication of evidence are: (1) investigating official (2) fabricates information (3) that is likely to influence a jury's verdict, (4) forwards that information to prosecutors, and (5) the plaintiff suffers a deprivation of life, liberty, or property as a result. See Garnett, 2016 U.S. App. LEXIS 17696, *36 (citing Ricciuti v. New York City Transit Auth., 124 F.3d 123, 130 (2d Cir. 1997).

Sgt. Diaz is the investigating official who submitted a false sworn statement in the criminal complaint concerning the facts giving rise to plaintiff's arrest. See Exhibit C ("defendant continued to walk in the street with her arms locked with four other people and would not stay on the sidewalk after the announcements were made"). His statements are contradicted by video evidence. Id. ("I observed at least thirty vehicles were forced to stop or slow down"). And a jury could further infer, in light of Sergeant Diaz's deposition testimony, that Sgt. Diaz provided additional false statements when speaking with a representative of the district attorney's office. See Diaz Dep. L1 at 61:3-17; 64:6-15. Sgt. Diaz also produced to the district attorneys' office a copy of his memobook entry for the incident, which allegedly he subsequently lost. See Diaz Dep. L1 at 66:13-16. A jury could determine that false statements by Sgt. Diaz were likely to influence a jury's decision and that they resulted in "a deprivation of liberty." See Garnett, 2016 U.S. App. LEXIS 17696 *30-31. Ms. Pinto was arrested without probable cause and was forced to appear in court twice before charges against her were dismissed. Defendants are not entitled to summary judgment on plaintiff's claim for evidence fabrication.

Point IV: Genuine disputes of material fact preclude summary judgment on plaintiff's claim for malicious prosecution

The material factual dispute as to whether plaintiff refused comply with a lawful order, and therefore the existence of probable cause, precludes summary judgment on plaintiff's claim for malicious prosecution. To establish a malicious prosecution claim under New York law, a plaintiff must prove (1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions. See Manganiello, 612 F.3d at 161. Defendants argue Ms. Pinto has failed to meet the requirements of the first, third, and fourth elements.

Plaintiff can establish the first and second element of malicious prosecution as Sgt. Diaz filed a criminal complaint against Ms. Pinto, and ultimately all charges were dismissed by motion of the district attorney. See Mitchell v. City of New York, 14 Civ. 0767, 2016 U.S. App.

LEXIS 19447, *14-15 (2nd Cir. October 28, 2016), citing Stampf v. Long Island R.R., 761 F.3d 192, 199 (2d Cir. 2014). Defendants mistake the law as recently reaffirmed by the court in Mitchell. Id. Further, as discussed supra, a jury could determine on the facts that Officer Diaz not only reported a crime or gave testimony, but initiated prosecution by providing a false statement sworn under oath to the DA to support criminal charges against Ms. Pinto. See Manganiello, 612 F.3d at 163, citing Ricciuti, 124 F.3d at 130. Ms. Pinto has raised a material factual dispute as to whether her conduct provided probable cause for an arrest, and a jury could find plaintiff established the third element of malicious prosecution.

Finally, Ms. Pinto can establish malice where she was arrested by Sgt. Diaz without probable cause and in retaliation for her First Amendment protected expression. First, actual malice can be inferred from a lack of probable cause. See Ricciuti, 124 F.3d at 131; see also Rounseville v. Zahl, 13 F.3d 625, 631 (2d Cir. 1994) ("New York courts have held that the existence of malice may be inferred from a finding that defendants lacked probable cause to initiate criminal proceedings."). Plaintiff has specifically alleged that Sgt. Diaz acted with improper purpose and with a "reckless disregard for the rights of plaintiff." Manganiello, 612 F.3d at 163-4. For these reasons, plaintiff has raised a material factual dispute as to whether probable cause existed for the arrest and whether defendants acted with malice, plaintiff's claim for malicious prosecution cannot be dismissed.

Point V: Qualified immunity cannot be granted in this case.

All of the law related to this case is clearly established. Qualified immunity only shields officials from liability for civil damages to the extent their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Supreme Court frames the qualified immunity inquiry as a two-part test: (1) whether the defendant violated a constitutional right, (2) if that right was clearly-established at the time of the incident. See Tolan, 134 S. Ct. at 1865-66. Thus, if the law is "clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." Harlow, 457 U.S. at 818-19, accord Kerman v. City of New York, 261 F.3d 229, 237 (2d Cir. 2001). A right is "clearly established" when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Here it was clearly established that Ms. Pinto had a right to be free from a warrantless arrest without probable cause, motivated by the exercise of her First Amendment right to criticize actions of the NYPD.

"An officer is entitled to qualified immunity against a suit for false arrest if he can establish that he had 'arguable probable cause' to arrest the plaintiff." Garcia v. Doe, 779 F.3d 84, 92 (2d Cir. 2014), (citing Zalaski v. City of Hartford, 723 F.3d 382, 390 (2d Cir. 2013)) (internal quotation marks omitted). Some courts have held "[a]rguable probable cause exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." Id., quoting Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir. 2004). Then-Judge Sotomayor clarified in Walczyk, "[w]hether reasonably competent officers could disagree about the lawfulness of the conduct at issue, however, is not the same question the Supreme Court has repeatedly instructed us to consider: whether "it would be clear to a reasonable officer that his [or her] conduct was unlawful in the situation he [or she] confronted." Walczyk v. Rio, 496 F.3d 139, 169 (2d Cir. 2007). Recent panel decisions support this understanding. See Raspardo v. Carlone, 770 F.3d 97, 113 (2d Cir. 2014); Terebesi v. Torreso, 764 F.3d 217, 230 (2d Cir. 2014).

The guidance of Justice Sotomayor aside, still "[s]ummary judgment on the basis of qualified immunity is appropriate when ***the only conclusion*** a rational jury could reach is that reasonably competent police officers could under the circumstances disagree about the legality of the arrest. Ricciuti, 124 F.3d at 128. Here defendants cannot establish that objectively reasonable officers would find Ms. Pinto's conduct gave rise to probable cause.

In deciding whether an officer's conduct was objectively reasonable a court looks to "the information possessed by the officer at the time of the arrest, but [does] not consider the subjective intent, motives, or beliefs of the officer." Amore v. Novarro, 624 F.3d 522, 536 (2d Cir. 2010) (internal quotation marks omitted). "An officer has probable cause to arrest when in possession of facts sufficient to warrant a prudent person to believe that the suspect had committed or was committing an offense." Ricciuti, 124 F.3d at 128). Arguable probable cause, however, must "not be misunderstood to mean 'almost' probable cause." Jenkins v. City of New York, 478 F.3d 76, 87 (2d Cir. 2007).

As discussed above, supra, the evidence as viewed in the light most favorable to plaintiff establishes there was a complete lack of probable cause for Ms. Pinto's arrest. Defendants cannot establish probable cause based on Ms. Pinto entering the street regularly to cross at intersections in compliance with the law. In fact, it is undisputed that during the demonstration officers allowed and assisted demonstrators in crossing the streets. See Diaz Dep. L1 at 12:14-17; Richardson Dep. at 28:7-11. Further, defendants cannot establish disorderly conduct based on Ms. Pinto briefly stepping into the street next to the curb at an intersection only to return to the sidewalk immediately when instructed. This case is entirely distinguishable from Garcia precedent where Ms. Pint was not "in prima facie violation of a straightforward statutory prohibition" when she was arrested. Garcia, 779 F.3d at 96. When viewing the facts in the light most favorable to plaintiff and with all permissible inferences in her favor, Ms. Pinto's conduct simply did not provide even arguable probable cause.

A reasonable officer is presumed to know clearly established law, and an arrest lacking in probable cause, motivated by a desire to retaliate against protected First Amendment expression, is not entitled to a finding of qualified immunity. See Papineau, 465 F.3d at 61 ("the facts as alleged by plaintiffs demonstrate that defendants violated plaintiffs' clearly established First Amendment rights of which a reasonable person would have known.") (internal citations omitted). Further, where material facts are disputed defendants are not entitled to qualified immunity as a matter of law. See Yorzinski v. City of New York, 14 Civ. 1302 (GHW), 2016 U.S. Dist. LEXIS 44251 *31-32 (S.D.N.Y. March 31, 2016) (citing Husain v. Springer, 494 F.3d 108, 133 (2d Cir. 2007)), see also C.G. v. City of New York, 12 Civ. 1606 (ARR) (VVP), 2013 U.S. Dist. LEXIS 153020 *31-32 (E.D.N.Y. Oct. 24, 2013).

Point VI: Genuine disputes of material fact preclude summary judgment on plaintiff's claim for municipal liability pursuant to Monell.

Defendants argue that plaintiff's Monell claim should be dismissed on the pleadings. However, the Second Circuit recently made clear that the role of the district court at this juncture is to determine whether there are no genuine issues of fact to be tried. See Willey v. Kirkpatrick, 801 F.3d 51, 62 (2d Cir. 2015). Here, plaintiff establishes that the NYPD had a pattern or practice of falsely arresting and using excessive force against demonstrators, that the City was put on notice of this and did nothing, as shown by its failure to discipline Sgt. Diaz despite multiple complaints, and that the City's inaction caused Ms. Pinto's constitutional injury. See Marlin v. City of New York, 15 Civ. 2235, 2016 U.S. Dist. LEXIS 122426, *55-63 (S.D.N.Y. Sept. 7, 2016).

A municipality may be held liable under section 1983 only if the plaintiff's injury is the result of municipal policy, custom, or practice. Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 691-4 (1978). Additionally, a plaintiff must prove the police, practice or custom resulted in a violation of plaintiff's constitutional rights and establish a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation." City of Canton v. Harris, 489 U.S. 378, 385 (1989).

To establish a municipal policy or custom, a plaintiff must allege one of the following: "(1) a formal policy officially endorsed by the municipality; (2) actions taken by the government officials responsible for establishing municipal policies related to the particular deprivation in question; (3) a practice so persistent and widespread that it constitutes a custom or usage sufficient to impute constructive knowledge of the practice to policymaking officials; or (4) a failure by policy makers to train or supervise subordinates." McLaurin v. New Rochelle Police Officers, 373 F. Supp. 2d 385, 399-400 (S.D.N.Y. 2005). Here, Ms. Pinto establishes that the City failed to train and discipline its officers despite its awareness of the regular use of excessive force against, and false arrest of, demonstrators engaged in protected First Amendment activity. Specifically, the City has (1) practices whereby the NYPD applies the prohibition on disorderly conduct against protestors without justification, (2) a practice of treating groups of protestors as a "unit" for "mass arrest" without first giving meaningful notice or opportunities for dispersal, (3) a practice of arresting protestors for a "failure to obey a lawful order" allegedly pursuant to the charge of N.Y.P.L. § 240.20(6) regardless of whether the conduct at issue constitutes a violation of the penal code, (4) a practice of failing to meaningfully investigate allegations of misconduct brought by protestors, (5) a practice of failing to discipline officers for the use of excessive force against or unlawful arrest of protesters. The City was put on notice of such practices and the City acted with deliberate indifference with respect to this information by failing to discipline officers, including defendant Sgt. Diaz. See Cassell Decl. at ¶ 24.

Defendants ignore a well developed adverse factual record. Sgt. Diaz has been a defendant in at least four prior federal actions filed in the Southern District of New York concerning conduct at demonstrations between October 26, 2011 and July 11, 2012. See Cassell Decl. at ¶ 24, Exhibit S. Despite prior complaints alleging Sgt. Diaz utilized excessive force against and falsely arrested protesters in violation of their constitutional rights, Sgt. Diaz has never been investigated by the IAB in regards to these allegations, or disciplined for the conduct alleged therein, nor has he received additional training in response to the allegations in these complaints. See Diaz Dep. L1 at 70:23-71:22, 81:21-25, 82:4-19; Diaz Dep. L2 at 7:12-19. That the City acted with a deliberate indifference with respect to this information is especially apparent in light of the video evidence produced to the City in these cases. See Exhibit S. Sgt. Diaz is a supervising officer in the Strategic Response Group, the “large scale Demonstration and Protest Unit.” See Diaz Dep. L1 at 42:20-45. And yet, Sgt. Diaz is unaware of any officers who have been disciplined for serving a summons or arresting an individual in violation of their First Amendment rights. See Diaz Dep. L1 at 81:21-25, 82:11-19.

In Marlin, supra, this Court reviewed an October 2015 report by the New York City Department of Investigation, Office of the Inspector General for the NYPD ("OIG-NYPD") and a 2012 joint research publication by The Global Justice Clinic at the New York University School of Law and the Walter Leitner International Human Rights Clinic at Fordham Law School. This court found compelling the documented police practices against protesters including "[a]ggressive, unnecessary and excessive police force" from September 2011 through July 2012. Marlin, 2016 U.S. Dist. LEXIS 122426 at *55-63. The federal lawsuits against Sgt.

Diaz discussed herein concern conduct by Sgt. Diaz at demonstrations falling within that time period. The City was not only put on notice of Sgt. Diaz's prior misconduct by virtue of the complaints in which they were served as defendants, but through production to the City of video of Sgt. Diaz's conduct at these demonstrations. See Cassell Decl. at ¶25. Here, Sgt. Diaz affirmatively testified he was not disciplined or trained in response to these complaints. See Diaz Dep. L2 at 7:12-19.

Viewed in the light most favorable to plaintiff, the record creates a plausible inference that the NYPD had a pattern or practice of falsely arresting and using excessive force against demonstrators, that the City was put on notice of this and did nothing, as shown by its failure to discipline or train Sgt. Diaz – among many other officers - despite multiple complaints. The City's inaction caused Ms. Pinto's constitutional injury. The City knew to a moral certainty that Sgt. Diaz and others in the Strategic Response Group would confront protesters engaged in political demonstrations, requiring training to discern what constitutes protected First Amendment activity as differentiated from a violation of N.Y.P.L. § 240.20, and that the wrong choice would cause the deprivation of a citizen's constitutional rights. See Walker v. City of New York, 974 F.2d 293, 297-98 (2d Cir. 1992).

Point VII: Genuine disputes of material fact preclude summary judgment on plaintiff's claims for assault and battery pursuant to state law.

Under New York law, "[i]f an arrest is determined to be unlawful, ***any use of force*** against a plaintiff may constitute an assault and battery, regardless of whether the force would be deemed reasonable if applied during a lawful arrest." Sulkowska v. City of New York, 129 F.Supp.2d 274, 294 (S.D.N.Y. 2001) (emphasis added, collecting cases interpreting New York law). Should there be probable cause for an arrest, officers may "still be liable for state law assault and/or battery if their use of force was unreasonable or excessive." Ladoucier v. City of New York, No. 10 Civ. 05089 (RJH), 2011 U.S. Dist. LEXIS 61379, at *25 (S.D.N.Y. June 6, 2011) (citations omitted). Here, genuine issues of material fact exist as to whether there was probable cause for plaintiff's arrest and whether Sgt. Diaz employed excessive force in effectuating Ms. Pinto's arrest. Accordingly, defendants are liable for assault and battery on plaintiff in their nonconsensual physical handling of her while in their custody.

Point VIII: Plaintiff complied with G.M.L. § 50 defeating any challenge to state law claims on that basis.

Plaintiff has complied with the applicable state law requirements pursuant to N.Y. Gen. Mun. Law § 50. Subsection § 50-e requires notice be served on a municipality within ninety (90) days after the claim arises. N.Y. Gen. Mun. Law § 50-e (1)(a). Plaintiff served a notice of claim on the City on July 28, 2015 within the ninety day period. See Exhibit E. Plaintiff's notice of claim identifies with particularity the date, time, location of the incident that gave rise to plaintiff's claims, stating "These claims arose on or about April 29, 2015 at approximately 9:10 P.M. and thereafter, at or around 12th Avenue between 56th and 57th Streets, in the county of New York, in the State of New York when petitioner was, *inter alia*, falsely arrested and subjected to excessive force." Id. The notice states the violations were committed "by employees, servants and agents of the New York City Police Department." Id. Plaintiff's notice of claim complied with the statutory requirements. See N.Y. Gen. Mun. Law § 50-e (1). Additionally, where records identifying officers by name are often maintained only by the City, defendants' suggest a requirement that would impermissibly extend municipal protection to officer defendants barring most claims. Plaintiff's notice of claim identifies the nature of the violation with sufficient particularity to enable defendants to investigate as intended by drafters of the statute.

Second, defendants' motion misstating the relevant facts concerning the alleged failure to arrange a 50-h hearing. After serving notice of the claim, plaintiff's counsel received an acknowledgment of claim letter dated August 13, 2015, mailed care of counsel Ranking & Taylor as listed on plaintiff's notice of claim. See Exhibit F. On or about September 8, 2016, Ms. Pinto received notice of a 50h-hearing improperly addressed only to "CARLENE PINTO 512 W 151 ST APT 1D" without a city, state, or zip code. See Exhibit G. It was never sent to plaintiff's counsel as identified on her notice of claim. See Cassell Decl. ¶ 9. Ms. Pinto immediately contacted the undersigned, who faxed adjournment requests to both Schiavetti Corgan (outside counsel for the City) and directly to the Comptroller's Office. See Cassell Decl. ¶ 11. The correspondence explained the reason for the adjournment and requested a new date merely 10 days later. Id. No further correspondence or response was received from either the Comptroller or Schiavetti Corgan. In fact, the letter mistakenly cited by defendants as correspondence from plaintiff is actually correspondence from Schiavetti Corgan to the City, specifically informing the municipality of the adjournment and requesting guidance, to which the City also apparently failed to respond. See Exhibit I. Plaintiff fully complied with the requirements of N.Y. Gen. Mun. Law § 50.

CONCLUSION

Defendants are correct that this is an incredibly simple case; the video speaks for itself. Defendants' motion for summary judgment must fail as it attempts to distract the Court from the video evidence with false testimony and disputed facts. It is undisputed Ms. Pinto complied with instructions and did not otherwise cause a disturbance. There can be no reasonable basis for Ms. Pinto's arrest. Defendants' motion for summary judgment should be denied.

Dated: November 11, 2016
New York, New York

Respectfully submitted,

By: ______________________

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